Buffalo Law Review

Volume 30 | Number 4 Article 6

10-1-1981

The Power of the Executive to Restrict the International Travel of American Citizens on National Security and Foreign Policy Grounds

Edward P. Yankelunas

THE POWER OF THE EXECUTIVE TO RESTRICT THE INTERNATIONAL TRAVEL OF AMERICAN CITIZENS ON NATIONAL SECURITY AND FOREIGN POLICY GROUNDS

INTRODUCTION

The right to travel is part of the "liberty" of which a citizen cannot be deprived without due process of law under the fifth amendment.[1] This principle is not limited to travel from state to state within the United States, but extends to travel abroad as well. The right to international travel has been held, in theory at least, to be no less an attribute of personal liberty than the right to interstate travel.[2] In practice, however, the courts have not been inclined to view the freedom to travel outside the United States to be inviolate or unqualified. Rather, in contrast to the right to interstate travel, the right to international travel has been considered to be no more than an aspect of the "liberty" protected by the due process clause of the fifth amendment.[3] As such, this "liberty" can be regulated within the bounds of due process.[4]

The very nature of international travel itself engenders, in part, what the government views as the need for regulation. The uninhibited movement of Americans within the volatile international arena may frustrate the President's efforts to conduct foreign affairs and maintain stable relations with other nations. Moreover, regulation of international travel may be considered to be required not only to prevent interference with the conduct of foreign policy, but also to protect travelers from physical harm[5] in

---

1. Kent v. Dulles, 357 U.S. 116, 125 (1958).

2. *See* Bauer v. Acheson, 106 F. Supp. 445, 451 (D.D.C. 1952). *See also* Boudin, *The Constitutional Right to Travel,* 56 COLUM. L. REV. 47, 49 (1956). The Supreme Court in Califano v. Aznavorian, 439 U.S. 170 (1978), (discussed below) recently delineated the "crucial difference" between the two freedoms of international and interstate travel. This difference goes to the degree of constitutional protection afforded these rights, and consequently to the standards applied in evaluating restrictions thereon.

3. The Court in *Aznavorian* relied on the reasoning of Justice Stewart's concurring opinion in Shapiro v. Thompson, 394 U.S. 618 (1969) in drawing this distinction between the rights of interstate and international travel.

4. *See* Califano v. Torres, 435 U.S. 1, 4 n.6 (1977).

5. *See* MacEwan v. Rusk, 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd,* 344 F.2d 963 (3d Cir. 1965).

areas where political and social upheaval prevail or where armed hostilities are in progress. In light of these considerations, the interest of the President, acting through the Secretary of State, in maintaining some degree of control over the worldwide travel of Americans becomes evident. The means for the Executive to exercise such control is generally through the regulation of passports pursuant to purported delegations of congressional authority. Reliance is also placed on the Executive's constitutional responsibility to conduct foreign policy. This Comment begins with an examination of the constitutional status of the right to international travel. Subsequent discussion focuses on the principle decisions which provide the proper mode of analysis for determining whether Congress has delegated to the Executive Branch the authority to deny or revoke a passport on national security grounds. The final Section examines the most recent Supreme Court case in this area which departs from earlier decisions of the Court and confers sweeping power on the Executive to restrict the international travel of Americans where such travel is deemed harmful to the national security and foreign policy of the United States.

I. THE RIGHT TO TRAVEL ABROAD

The United States Constitution contains no express language providing for a right to international travel. Despite this fact, the United States Supreme Court and the lower federal courts have been uniform in holding that the right to travel abroad is deserving of constitutional protection.[6] The Supreme Court first recognized

6. *See, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Zemel v. Rusk, 381 U.S. 1 (1965); Shapiro v. Thompson, 394 U.S. 618 (1969) (concurring opinion of Stewart, J. and dissenting opinion of Harlan, J.); Califano v. Aznavorian, 439 U.S. 170 (1978); Schactman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959); Worthy v. United States, 328 F.2d 386 (5th Cir. 1964); Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967); Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974). *See also* Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952); Boudin v. Dulles, 136 F. Supp. 218 (D.D.C. 1955); MacEwan v. Rusk, 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965); Woodward v. Rogers, 344 F. Supp. 974 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973). *Bauer* is considered to be the first case in which a federal court found the freedom to travel abroad to be an aspect of "liberty" protected by due process clause of the fifth amendment. In comparing the right to international travel to the right to interstate travel, the court reasoned that it is difficult to see where the freedom to travel ouside the United States is any less an attribute of personal liberty. *See also* Boudin, *supra* note 2 at 47, 49, 56.

the status of this right in *Kent v. Dulles*.[7] There, the Court ruled that Congress had not granted the Secretary of State the authority to promulgate regulations[8] providing that no passport could be issued to Americans who were Communist Party members. Justice Douglas, writing for the Court, found that:

> The right to travel is part of the liberty which the citizen cannot be deprived of without due process of law under the Fifth Amendment . . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats or wears, or reads. Freedom of movement is basic in our scheme of values . . . . Freedom to travel is indeed an important aspect of the citizen's liberty.[9]

While *Kent* embodied a recognition of the right to international travel, a later decision resulted in some confusion with regard to the source of that right. The Supreme Court's reasoning in *Aptheker v. Secretary of State*[10] caused some to believe that the Court was adopting the theory that the right to travel abroad was founded in the first amendment guarantee of freedom of speech and association. In *Aptheker* the Court was concerned with the validity of Section 6 of the Subversive Activities Control Act.[11] That provision prohibited members of Communist organizations who were required to register with the Subversive Activities Control Board from knowingly applying for, using, or attempting to use a passport. Section 6 rendered irrelevant the member's degree of activity in the Communist Party and established an irrebuttable presumption that individuals who were members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States.[12] Citing *Kent*, the Court reiterated that the right to travel abroad is an important aspect of the citizen's "liberty" guaranteed by the due process clause of the fifth amendment.[13] In evaluating the validity of Section 6, the Court

---

7. 357 U.S. 116 (1958).

8. 22 C.F.R. § 51.135 (1952); 22 C.F.R. § 51.142 (1952). Relying on these regulations, the Secretary of State denied the passport applications of two individuals—Rockwell Kent and Dr. Walter Briehl—because each refused to file an affidavit concerning his membership in the Communist Party.

9. 357 U.S. at 125-26.

10. 378 U.S. 500 (1964).

11. 50 U.S.C. § 785.

12. 378 U.S. at 511. Section 6 operated to prohibit travel abroad for any member of specified organizations regardless of the purposes for which the individual wished to travel.

13. *Id.* at 505.

recognized that anyone falling within the Act would have to abandon their membership in order to regain their freedom to travel. While the government argued that such an alternative lessened the restrictive effect of the legislation,[14] Justice Goldberg, writing for the Court, found otherwise and held:

> Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed on the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.[15]

Determining "that Congress [had] within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security,"[16] the Court held that Section 6 was unconstitutional on its face.[17] However, the Court went on to conclude that the freedom to travel is a constitutional liberty closely related to rights of free speech and association and applied first amendment standards of review.[18] One interpretation of *Aptheker* is that some members of the Court adopted the view that the right to travel, being a personal rather than a property right, is entitled to protection under the fifth amendment commensurate with protection afforded rights of expression and association under the first amendment.[19] However, the more widely accepted interpretation of *Aptheker* is that the Court merely recognized that first amendment rights are related to the right to travel in certain specific situations such as where a citizen's enjoyment of liberty to travel is contingent on the abandonment of the first amendment right of association.[20] Thus, the relationship of freedom to travel abroad with first amendment rights appears to be limited to instances where a violation of first amendment rights is the primary wrong

---

14. *Id.* at 507.

15. *Id.*

16. *Id.* at 512-13. With respect to the notion that Congress had less drastic means to implement its objective, Justice Goldberg adopted as controlling the language of Justice Stewart in Shelton v. Tucker, 364 U.S. 479 (1960), where it was held: "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488.

17. 378 U.S. at 514. Justice Goldberg reasoned that the challenged "section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and indiscriminately across the liberty guaranteed in the Fifth Amendment."

18. *Id.* at 517.

19. *See* Note, *The Right to Travel Abroad*, 42 FORDHAM L. REV. 838, 842 (1974).

20. *Id.* at 843.

visited upon the prospective traveler and not where travel alone is infringed.

In 1965 the Supreme Court, in *Zemel v. Rusk*,[21] reinforced this interpretation of *Aptheker* and clearly rejected the notion of a substantive right to international travel involving first amendment considerations. In *Zemel* a United States citizen's request to have his passport validated for travel to Cuba was denied pursuant to a State Department's travel ban to that country. The appellant argued that the State Department's area restriction was violative of the first amendment right of citizens to ". . . travel abroad so that they might acquaint themselves at first hand with the effects of our government's policies, foreign and domestic and with conditions abroad which might effect such policies."[22] While conceding that the travel ban to Cuba restricted the flow of information concerning that country, and that such a restriction should be considered in determining if the appellant has been afforded due process of law, the Court held that:

> [W]e cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports to Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed with ingenious argument in the garb of decreased data flow . . . . The right to speak and publish does not carry with it an unrestricted right to gather information.[23]

The *Zemel* Court distinguished *Aptheker* on the grounds that the refusal to validate Zemel's passport did not result from any expression or association on his part. He was not being forced to choose between his membership in an organization and his freedom to travel.[24] Thus, the Court rejected the argument that the right to international travel was based on the first amendment, and limited *Aptheker* to its facts.

In his dissenting opinion in *Zemel*, Justice Douglas argued, as he had done in *Aptheker*, that the right to international travel is at the "periphery" of the first amendment.[25] Such a finding was

---

21. 381 U.S. 1 (1965).
22. *Id.* at 16.
23. *Id.* at 16-17.
24. *Id.* at 16.
25. *Id.* at 26. That concept is illustrated by Justice Douglas in the following language:
> Freedom of movement is kin to the right of assembly and to the right of association. These rights may not be abridged . . . only illegal conduct being within the

based on the recognition that "the right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad, as well as at home, gives meaning and substance to freedom of expresson and freedom of the press."[26] However, the Supreme Court and the lower federal courts have repeatedly held that the liberty to travel abroad is only a fifth amendment right.[27] Consistent with this finding, the District Court for the District of Columbia has held that the right to travel abroad is not a right to think or speak, it is a right to be physically present in a certain place.[28] Infringements on the right to travel involve actual inhibition of one's freedom of movement. As such, the international travel right is limited in scope and its protection does not extend to the freedoms of speech and association. Thus, even if speech is contemplated by a traveler at his destination, the right to travel abroad is still governed by fifth amendment due process considerations.[29] The freedom to travel internationally, however, is a distinct substantive right.

The Supreme Court recently compared the right to travel abroad with the right to interstate travel in *Califano v. Aznavorian.*[30] The Court stated:

> purview of crime in the constitutional sense. War may be the occasion for serious curtailment of liberty. Absent war, I see no way to keep a citizen from traveling within or without a country unless there is power to detain him. And no authority to detain him exists except under extreme conditions . . . . The freedom of movement is the very essence of our society, setting us apart.

Id. at 26, (Douglas, J., dissenting).

26. *Id.* at 24.

27. *See, e.g.,* Califano v. Torres, 435 U.S. 1 (1978); Califano v. Aznavorian, 439 U.S. 170 (1978); Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967); Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974); Woodward v. Rogers, 344 F. Supp. 974 (D.D.C. 1972), *aff'd,* 486 F.2d 1317 (D.C. Cir. 1973). These cases adopted the view of the *Zemel* majority and contain express statements to the effect that the right to travel abroad is protected by the due process clause of the fifth amendment.

28. *See* MacEwan v. Rusk, 228 F. Supp. 306, 309 (E.D. Pa. 1964), *aff'd,* 344 F.2d 963 (3d Cir. 1965).

29. *See* Berrigan v. Sigler, 499 F.2d 514, 519-20 (D.C. Cir. 1974) where the court found:

> Association, as well as speech, always is to be expected and, indeed, may be inevitable at the [traveler's] destination, but this does not render invalid legitimate restrictions upon travel for any such reason . . . . [T]he enforcement of legitimate regulations must not be diluted or rendered impractical because as an incident to their application, speaking, association or writing may be effected.

Id.

30. 439 U.S. 170 (1978). In Califano v. Aznavorian the Court held that a provision of the Social Security Act depriving a recipient of the right to Supplemental Security Income

> The Constitutional right to interstate travel is virtually unqualified . . . . By contrast, the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such, this 'right' . . . can be regulated within the bounds of due process.[31]

The right to interstate travel is an incident of national citizenship[32] and has been held to be among the "[p]rivileges and immunities of citizens of the United States [which] arise out of the nature and essential character of the national government."[33] Thus, while both the freedom of international and interstate travel may have attributes of personal liberty,[34] interstate travel is afforded a greater measure of constitutional protection. While the ability to travel abroad without unreasonable governmental restriction is an important part of the citizen's freedom, it is not a fundamental right.

II. Restrictions on the Right to Travel Abroad and Standards for Review

The acceptance of the right to international travel as an unenumerated liberty protected by substantive due process[35] implies the absence of arbitrary restraint, not immunity from reasonable regulation.[36] As Chief Justice Hughes once held: "[l]iberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and adopted in the interest of the community is due process."[37]

Regulation of international travel has been found reasonable where its exercise was held to be justified in the national interest on the basis of foreign policy considerations. In *MacEwan v.*

---

benefits for any month during all of which the recipient was outside the United States did not violate the right to international travel. *See* text accompanying notes 49-56 *infra*.

31. 439 U.S. at 176.

32. *See* Edwards v. California, 314 U.S. 166, 178 (1941) (Douglas, J., concurring).

33. *See* Twining v. New Jersey, 211 U.S. 78, 97 (1908); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867).

34. *See* note 6 *supra*.

35. *See* L. Tribe, American Constitutional Law, 570 (1978). Professor Tribe maintains that the "Bill of Rights presume the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty . . . ."

36. *See* Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1910).

37. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

Rusk,[38] the President, acting through the Secretary of State, imposed travel restrictions to Cuba where the plaintiff had sought to travel. The court held that the right to international travel is surrounded by "innumerable restrictions" which may be governmental as well as personal or private.[39] The court went on to find that:

> National interest may require that American citizens be excluded from a specified area at a particular time for their own protection as well as to prevent their interference with the proper conduct [by the Executive] of American foreign policy . . . the *reasonableness of restrictions on travel to Cuba, if the inherent power exists, can hardly be questioned.*[40]

The court then proceeded to determine that, incident to his duty to conduct foreign affairs, the President did have inherent power to prevent travel by American citizens to countries where their presence might jeopardize the relations of the United States with foreign countries.[41] However, in *Lynd v. Rusk*,[42] the Court of Appeals for the District of Columbia rejected the notion that the Executive had such inherent authority. Noting that in *Zemel* the Supreme Court did not predicate its decision on that ground,[43] the court of appeals reasoned that any claim of inherent authority would run afoul of the Supreme Court's warning in *Kent* that, as freedom to travel is part of the liberty protected by the fifth amendment, "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."[44] Where regulation meets that requirement, has a substantial "relation" to the Executive's "legitimate objective" of conducting foreign affairs, and that objective is sought in the interest of public welfare,[45] the essentials of due process are satisfied.

In *Kent* the Supreme Court warned that where a restriction on the right to travel abroad results from delegated powers, the

---

38. 228 F. Supp. 306 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965).
39. 228 F. Supp. at 308.
40. *Id.* (emphasis added).
41. *Id.*
42. 389 F.2d 940 (D.C. Cir. 1967).
43. *See* text accompanying note 108 *infra*.
44. Kent v. Dulles, 357 U.S. 116, 129 (1958).
45. *See* Bauer v. Acheson, 106 F. Supp. 445, 451 (D.D.C. 1952), where the court held: 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' Thus, freedom to travel abroad, like other rights, is subject to reasonable regulation and control in the interest of the public welfare. [footnotes omitted].

statute authorizing such restrictions will be narrowly construed.[46] However, while the Court recognized that the freedom to travel internationally is an important aspect of a citizen's "liberty", it "did not decide the extent to which it can be curtailed . . . [but only] the extent . . . to which Congress [had] authorized its curtailment."[47] The Court did not reach the constitutional issue of whether the petitioner's right to travel had been infringed, but merely held that Congress had not delegated to the Secretary the authority to deny passports on the basis of an applicant's political beliefs or associations.[48] Therefore, standards for evaluating restrictions on the freedom to travel abroad were neither prescribed nor employed.

In *Califano v. Aznavorian* the Supreme Court rejected the argument that a statutory provision which may be valid under traditional due process criteria of reasonableness, should be judged by a more stringent standard because of its restrictive effect on international travel.[49] This argument was predicated on Aznavorian's position that the freedom to international travel is basically equivalent to the right of interstate travel.[50] In that case, the Court ruled that section 1611(f) of the Social Security Act,[51] which provides that no benefits are to be paid under the Supplemental Security Income program for any month in which a recipient was outside the United States, did not impermissibly burden the freedom to travel internationally. The Court reasoned that legislation which allegedly infringes upon the right to travel abroad "is not to be judged by the same standards applied to laws [which restrict] the right of interstate travel."[52] Justice Stewart, however, was not entirely consistent in his reasoning. At one point in his opinion for the Court, he maintained that: "[u]nless the limitation imposed by Congress is *wholly irrational,* it is constitutional in spite of its incidental effect on international travel."[53] Justice Marshall, in a concurring

---

46. 357 U.S. at 129.

47. *Id.* at 127.

48. The Court found that Congress, in enacting the Passport Act of 1926 and § 215 of the Immigration and Nationality Act of 1952, did "not delegate to the Secretary of State the kind of authority exercised. . . ."

49. *See* Califano v. Aznavorian, 439 U.S. 170, 175 (1978).

50. *Id.* at 176. *See also* text accompanying note 31 *supra.*

51. 42 U.S.C. § 1382(f).

52. 439 U.S. at 177.

53. *Id.* (emphasis added).

opinion joined by Justice Brennan, found the use of the phrase "wholly irrational" to be unfortunate in that it implies that welfare legislation is subject to a lesser standard of review than the rational basis test since fundamental interests or suspect classifications were not involved.[54] A possible explanation for the use of language that implies the application of a less stringent standard than "reasonableness" may be that it was used in an evaluation of legislation that had only an "incidental effect on international travel."[55] It is noteworthy that Justice Stewart returned to traditional language at the close of his opinion in concluding that the constitutionality of the challenged provision did "not depend on compelling justifications. It is enough if [it] is rationally based."[56]

It is apparent that the Court will not evaluate restrictions on international travel with standards applicable to fundamental rights. *Aznavorian* cleared up confusion caused by the Court's reliance on first amendment decisions to provide standards to review the travel restriction in *Aptheker*.[57] The position was taken in subsequent cases[58] that a more stringent standard than "reasonableness" should be applied where international travel is restricted. However, as noted above, the most widely accepted position regarding the standards for review enunciated in *Aptheker* is that the application of the "compelling government interest" test is

---

54. *Id.* at 178-79.

55. *Id.* at 177. In this connection, Justice Stewart reasoned that:

> The statutory provision in issue . . . did not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent, Aptheker,* or *Zemel* cases. It does not limit the availability of passports . . . . It merely withdraws a government benefit during and shortly after an extended absence from this country.

Id. at 177.

56. *Id.* at 178.

57. *See* NAACP v. Button, 371 U.S. 415 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940).

58. *See, e.g.,* United States v. Davis, 482 F.2d 893, 912 (9th Cir. 1973) where the court found: "[I]t is firmly settled that the freedom to travel at home and abroad without unreasonable government restriction is a *fundamental constitutional right* of every American citizen." (emphasis added). The *Davis* court then tested the validity of the restriction of international travel in that case by applying the first amendment decision standards of scrutiny employed in *Aptheker.* However, while the usage of the term "fundamental constitutional right" to denote international travel might not have been appropriate, *Davis* can be reconciled with *Zemel* and *Aznavorian* to the extent that it falls within the generally accepted interpretation of *Aptheker. See* text accompanying note 20 *supra.* In *Davis* the citizen's travel right was conditioned on the relinquishment of his fourth amendment right to be free from an unreasonable airport search of his luggage before an international flight.

limited to the specific situations where the right to travel abroad is conditioned on the relinquishment of another constitutional right—such as the freedom of speech or association.[59] Therefore, unless a prospective traveler's primary injury is an infringement on a fundamental right, government regulation of international travel alone need only be reasonable[60] or rationally based[61] to pass constitutional muster.

III. Passport Regulation by the Executive

Legal problems regarding the restriction of international travel are of relatively recent origin. While the United States Government has issued passports through the State Department since the early days of the republic, during most of our country's history, with the exception of times of war, American citizens have been free to enter or leave the country without the government's permission.[62] The traditional function of a passport was limited as well:

> The American passport is a document of identity and nationality, issued to persons owing allegience to the United States and intending to travel or sojourn in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. *It has no other purpose.*[63]

However, the nature and significance of the passport changed considerably when Congress amended the Travel Control Act in 1941 making it a crime to enter or leave the United States without a valid passport in times of war or national emergency.[64] In 1952

---

59. *See* note 20 *supra.*

60. *See* Nebbia v. New York, 219 U.S. 502, 525 (1934).

61. *See* text accompanying note 56 *supra.*

62. *See* Note, *Passport Control in the National Interest and Freedom to Travel,* 33 Temp. L. Q. 332, 332 (1960).

63. *Id.* (emphasis added). *See also* Boudin, *The Constitutional Right to Travel,* 56 Colum. L. Rev. 47, 53 n.51 (1956).

64. Act of June 21, 1941, ch. 210, 55 Stat. 252-253. The rules promulgated under this statute, 6 Fed. Reg. 6069-70, 6349, 5821 (1941), recognized the Secretary's discretion and called for considerations of whether the use of the passport would be "prejudicial to the interests of the United States." *See also* Note, *Passport Control in the National Interest and Freedom to Travel,* 33 Temp. L. Q. 332, 332 (1956). Congress enacted the Travel Control Act in 1918 which provided that, upon Presidential wartime proclamation, "it shall,

Congress mandated that such requirements be continued by passing the Immigration and Nationality Act which authorized the President to impose passport requirements on American citizens during any war or national emergency he declares.[65] In 1978 Congress amended the Act requiring passports for entry into and departure from the United States at all times.[66] Moreover, the Passport Act of 1926 empowers the President to prescribe rules to guide the Secretary of State in granting and issuing passports.[67] Therefore, inasmuch as the enjoyment of the right to international travel is conditioned on the possession of a valid passport, that document, and the power of the Executive to regulate its issuance, takes on great significance.

Administrative regulation of passports is not limited to the revocation of passports for violations of law,[68] for fraud in procuring or issuing passports,[69] or on other conditions bearing on the applicant's eligibility[70] to possess a passport. Area restrictions have been a vital tool used by the Executive to curtail the international

---

except as otherwise provided by the President . . . be unlawful for any citizen . . . to depart from or enter . . . the United States unless he bears a valid passport." Act of May 22, 1918, §§ 1 and 2, 40 Stat. 559. The dissenting Justices in *Kent* asserted that "[t]he legislative history of the 1918 Act sharply indicates that Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security." 357 U.S. at 132 (Clark, J., dissenting).

65. Act of June 27, 1952, § 215, 66 Stat. 190, 8 U.S.C. § 1185(b).

66. 8 U.S.C. § 1185(b) now states:

> Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

67. 22 U.S.C. § 211a (1976). The authority of the Secretary of State and consular officials to issue passports "under such rules as the President shall designate and prescribe for and on behalf of the United States" has existed since the first Passport Act was adopted on August 18, 1856, ch. 127, 11 Stat. 60-61. The quoted language has remained unchanged.

68. *See* Kent v. Dulles, 357 U.S. 116, 127 (1958). Justice Douglas' opinion in *Kent* makes clear that unlawful conduct is itself sufficient to warrant the refusal to issue or renew a passport, as well as its revocation by the Secretary.

69. 18 U.S.C. § 1542 provides criminal penalties for false statements made in passport applications.

70. Under 22 C.F.R. § 51.70(a) the Secretary may deny a passport to an applicant who: (1) is subject to an outstanding Federal warrant for arrest; (2) is subject to a court order or conditions of parole or probation forbidding departure from the United States; (3) is subject to a court order committing him to a mental institution; (4) is the subject of a request for extradition or provisional arrest for extradition which has been presented to the government of a foreign country or (5) is the subject of a subpoena in a matter involving Federal prosecution or a grand jury investigation of a felony.

travel of Americans. The authority to impose area restrictions is largely based on the power vested in the President by the Passport Act, the Immigration and Nationality Act and his inherent responsibility to conduct foreign policy.

As noted earlier, the Supreme Court upheld a travel ban to Cuba in *Zemel,* where a citizen's application to have his passport validated for travel to that country was denied pursuant to the Passport Act of 1926.[71] The Court rejected the argument that the Act and the restriction imposed by the Executive violated the fifth amendment by depriving citizens of the right to travel abroad without due process and found that the Act provided the Executive with the authority to impose the area restriction.[72] In noting that the "liberty" to travel is not unlimited, the Court emphasized that due process requirements are a function not only of the extent of the government's restrictions imposed, but also of the extent of the necessity of the restriction.[73] In the Court's view, the fear that travel to Cuba might involve the nation in dangerous international incidents[74] embodied the requisite degree of necessity to justify limitations on the liberty of American citizens.

In *MacEwan v. Rusk,* the court noted that the Secretary of State did not seek to rely on inherent executive power alone in promulgating the regulations in issue.[75] The Secretary had also pointed to the Passport Act of 1926[76] and the Immigration and Nationality Act of 1952[77] as additional sources of authority to regulate travel. The court then turned to a consideration of the administrative history of area restrictions imposed by the Executive under the Passport Act of 1926.[78] Noting the President's wide degree of discretion and freedom from restriction when acting in the area of foreign affairs pursuant to the Passport Act and § 215(b) of the Immigration and Nationality Act, it was held that neither stat-

71. 22 U.S.C. § 211a (1958).

72. Zemel v. Rusk, 381 U.S. 1, 7, 14-15 (1965).

73. *Id.* at 14.

74. The Court noted that considerations of national security were best pointed up in *Zemel* by "recalling that the Cuban Missile Crisis of October, 1962 preceded the filing of appellant's complaint by less than two months." 381 U.S. at 16.

75. 228 F. Supp. at 310.

76. 22 U.S.C. § 211a (1958).

77. Act of June 27, 1952, § 215, 66 Stat. 190, 8 U.S.C. § 1185(b).

78. 228 F. Supp. at 313-14.

ute was unconstitutional.[79] Rather, both were found to authorize the challenged geographical limitations. With respect to considerations of "the safety of the nation in its relations with the nations of the world,"[80] the court concluded: "Judged by the fundamental need of self preservation, the Government's restrictions on plaintiff's freedom to travel is a reasonable one which does not deprive him of substantial due process."[81]

In *United States v. Travis*[82] the court upheld a travel restriction to Cuba which was found to be justified by conditions which were considered "prejudicial to our country's best interests" in the pursuance of foreign affairs.[83] The court found that the Executive had a constitutional, or in the alternative, a statutory basis for imposing area restrictions on travel to Cuba. Specifically, the court concluded that *even if* the constitutional authority of the President to conduct foreign affairs is not sufficient to authorize the limitations on travel to Cuba, § 215(b) of the Immigration and Nationality Act clearly provides the necessary authority.[84]

The Executive has imposed area restrictions where, under its informed judgment, the atmosphere of international tension requires that Americans be excluded from a specified area at a particular time for their own protection and to prevent the interference with the proper conduct of United States foreign policy.[85] The Executive does not have unbridled discretion to withhold a passport from a citizen;[86] it may not restrict international travel in the absence of congressional approval. However, the passport is itself an instrument of foreign policy,[87] and in light of the Executive's

79. *Id.* at 314-15.

80. *Id.* at 315.

81. *Id.*

82. 241 F. Supp. 468 (S.D. Cal. 1963).

83. In *Travis*—which preceded the Supreme Court's decision in *Zemel* by two years—the defendant was indicted for departing from the United States for travel to Cuba, via Mexico, in contravention of the same State Department regulation relied on by the Secretary in *Zemel* and *MacEwan*. The defendant alleged that there was no legislative history for regulating travel on a geographical basis in general, or to Cuba in particular. It was also alleged that 8 U.S.C. § 1185(b) delegates legislative power contrary to Article I Section 8 of the Constitution and is vague and therefore contrary to the first and fifth amendments thereby depriving defendant of liberty without due process of law. 241 F. Supp. at 469.

84. 241 F. Supp. at 471.

85. 228 F. Supp. at 308-09.

86. 357 U.S. at 128.

87. *See* Kent v. Dulles, 357 U.S. 116, 120-21; Urtetigui v. D'Arcy, 34 U.S. (9 Pet.) 692, 699 (1835).

exclusive responsibility in that area, the courts have consistently upheld reasonable regulation of travel designed to protect national security.

IV. *Zemel v. Rusk*

Zemel[88] is a touchstone for any consideration of the President's power, acting through the Secretary of State, to impose restrictions on the international travel of Americans to protect the national security and foreign policy of the United States. The significance of that decision with respect to the source and nature of the right to international travel has been discussed above.[89] This section will concentrate on the validity of the Executive's reliance on statutes—most notably, the Passport Act of 1926—in restricting travel through passport regulation. It will become clear that a fundamental notion in this regard is the great weight given to prior administrative practice under the Passport Act of 1926 and related legislation.

On January 3, 1961, the United States broke diplomatic and consular relations with Cuba, and on January 16 of that year the Secretary of State declared all outstanding passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary."[90] In early 1962, Zemel, who was a United States citizen and a holder of an otherwise valid passport, applied to the State Department to have his passport validated for travel to Cuba as a tourist. After this request was denied he renewed his request on October 20, 1962, stating that the purpose of the proposed trip was "to satisfy my curiousity about the state of affairs in Cuba and to make me a better informed citizen."[91] This request was also denied because he did not fall within the class of persons for whom the department planned to grant exceptions for travel to or in Cuba.

Following this denial Zemel brought suit against the Secretary and the Attorney General in federal district court, alleging that the Passport Act of 1926 and § 215(b) of the Immigration and Nation-

88. Zemel v. Rusk, 381 U.S. 1 (1965).

89. *See* text accompanying notes 21-24 *supra.*

90. *Id.* at 3. The State Department contemplated granting exceptions to "persons whose travel might be considered as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests." *Id.*

91. *Id.* at 4.

ality Act were unconstitutional.[92] The Court limited its consideration to the validity of the Passport Act of 1926.[93] The Act provides: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States and no other person shall grant, issue or verify such passports."[94]

The Court reasoned that the language of the Passport Act was broad enough to authorize area restrictions and that there was no legislative history indicating an intent to exclude such restrictions from the grant of authority.[95] The Court took this position after recognizing that the legislative histories of the 1926 Act and its predecessors do not expressly indicate an intention to authorize area restrictions.[96] However, the lack of express language granting the authority to impose such restrictions was not dispositive. The Court relied on the extensive administrative history of passport controls to find implicit congressional approval of the Executive's actions where explicit approval was lacking.

Accordingly, Chief Justice Warren maintained that the broad language of the Passport Act of 1926 took on added significance when viewed in light of the fact that in the decade preceding its

---

92. *Id.* Chief Justice Warren noted in the margin, 381 U.S. at 7, that: "Appellant in this case does not challenge merely a 'single, unique exercise' of the Secretary's authority . . . . On the contrary, this suit seeks to 'paralyze totally the operations of an entire regulatory scheme,' indeed, a regulatory scheme designed and administered to promote the security of the Nation." 381 U.S. at 7.

93. *Id.* at 19-20. The Court determined that adjudication of the validity of § 215(b) of the Immigration and Nationality Act was unwarranted. In view of the fact the appellant's complaint did not indicate whether he planned to travel to Cuba directly, or via one or more countries, and that the papers filed by the Government did not indicate whether criminal charges would be brought against Zemel for violating § 215(b), the Court stated:

> Whether each or any of these gradations of fact or charge would make a difference as to criminal liability is an issue on which the District Court wisely took no position. Nor do we. For if we are to avoid rendering a series of advisory opinions, adjudication of the reach and constitutionality of § 215(b) must await a concrete fact situation.

94. 22 U.S.C. § 211a (1958).

95. 381 U.S. at 7-8. Chief Justice Warren, in writing for the Court, began consideration of the appellant's constitutional attack on the Passport Act of 1926 by stating: "We think the Passport Act of 1926 . . . embodies a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to Cuba." *Id.*

96. *Id.* It is generally understood that when Congress enacted the original Passport Act in 1856 it intended to centralize the power to issue passports in the Secretary of State and to remove such power from the various federal, state and local officials who in the past issued passports or similar documents. *See* Kent v. Dulles, 357 U.S. 116, 123 (1958); MacEwan v. Rusk, 228 F. Supp. 306, 313 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965).

passage the Executive had imposed both peacetime and wartime restrictions.[97] The Chief Justice referred to restrictions imposed on travel to Belgium in 1915 due to famine in that country. Also, from December 9, 1914, through the end of World War I, passports were validated for specific purposes and to specific countries only. No passports were issued for travel to Germany and Austria until 1922 and none to the Soviet Union until 1923.[98] In light of this prior practice, the Court determined that:

> The use in the 1926 Act of language broad enough to permit Executive imposition of area restrictions after the Executive had several times in . . . the past openly asserted the power to impose such restrictions under predecessor statutes containing substantially the same language, supports the conclusion that Congress intended in 1926 to maintain in the Executive the authority to make such restrictions.[99]

The Court held that even in the absence of passport legislation since the passage of the 1926 Act, the post-1926 history of Executive imposition of area restrictions as well as the pre-1926 history would be relevant to a construction of the Act favorable to permitting area restrictions by the Executive.[100]

Moreover, the Court stressed that Congress, knowing of this prior practice, left completely untouched the broad rule-making authority granted in that Act when it passed the Immigration and Nationality Act of 1952.[101] Chief Justice Warren pointed out that *Kent* was distinguishable because, there, the Court had been unable to find an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had approved of passport refusals based on the applicant's political beliefs and associations.[102]

Kent involved a situation where the applicant was being compelled to choose between his rights of association and travel. In *Zemel* the Secretary refused to validate the applicant's passport because of foreign policy considerations affecting all citizens.[103] With respect to these concerns, the Court found that the area restriction was supported by the weightiest considerations of na-

97. 381 U.S. at 7-8.
98. *Id.* at 9.
99. *Id.*
100. *Id.* at 11.
101. *Id.* at 12.
102. *Id.* at 12-13.
103. *Id.*

tional security.[104] It is noteworthy that Zemel's suit was initiated just after the Cuban Missile Crisis. Considering the tension with Cuba and the fact that the Castro regime had arrested and imprisoned Americans without charges, the Court reasoned that in light of the President's obligation under the Hostage Law[105] to secure the release of Americans unjustly deprived of liberty, the Secretary was justified in concluding that travel to Cuba might incite international incidents. The Court concluded that the Constitution did not require the Secretary to validate passports for such travel.[106]

The *Zemel* majority also found that standards for the formulation of travel controls by the Executive under the Passport Act are not impermissibly indefinite. The Court found that Congress had consistently provided very general standards, and often the power of unrestricted judgment, to the President in respect to subjects affecting foreign relations.[107] Due to the President's access to information and the very nature of his office, he is much more capable than Congress to respond quickly to international emergencies. Moreover, general standards of congressional delegations are evidence that Congress recognizes its own limitations in that area.

However, the significance of *Zemel* with respect to the power of the President to restrict travel of Americans for foreign policy reasons lies in its recognition of implicit congressional approval of such actions where explicit approval is absent. Accordingly, Chief

---

104. *Id.* at 16. *See also* note 74 *supra.*

105. The Hostage Statute, R.S. § 2001, 22 U.S.C. § 1732 provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

106. 381 U.S. at 15.

107. *Id.* at 17. *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). The Court there found that:

> if in the maintenance of our international relations embarrassment . . . is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

Justice Warren, near the conclusion of his opinion wrote:

> We have held [in] *Kent v. Dulles* . . . and reaffirm today that the 1926 Act takes its content from history: it authorizes only those passport refusals and restrictions "which it could fairly be argued were adopted by Congress in light of prior administrative practice." . . . So limited, the Act does not constitute an invalid delegation.[108]

Thus, the prior administrative practice of area restrictions embodies implicit congressional approval of the Executive's actions. That implicit approval satisfies the *Kent* criteria as a delegation of the law-making function of Congress and legitimizes regulation of the fifth amendment liberty to travel abroad.

A major element in the reasoning of the courts in upholding area restrictions is that they entail geographical limitations applicable to everyone, without regard to individual beliefs or associations;[109] they have been justified on the basis of foreign policy considerations affecting all citizens.[110] However, can these same considerations justify the revocation of the passport of an individual citizen whose worldwide travel harms national security? The following section examines an important decison where that issue was addressed.

V. *Haig v. Agee*

In *Haig v. Agee*[111] the Supreme Court was faced with the task of considering the validity of a State Department regulation[112] which authorized the revocation of the passport of a United States citizen on national security and foreign policy grounds. The respondent, Phillip Agee, was a former employee of the Central Intelligence Agency residing in Hamburg, West Germany. He is a leading critic of the CIA's clandestine operations throughout the world and has written and spoken extensively attacking American intelligence efforts, and has purportedly revealed the identities of certain undercover CIA agents.[113] Agee was issued a passport on

---

108. 381 U.S. at 17.
109. 228 F. Supp. at 308.
110. 381 U.S. at 13.
111. 453 U.S. 280 (1981).
112. 22 C.F.R. § 51.70(b)(4) (1979).
113. Agee participated in the publication of a book entitled DIRTY WORK: CIA IN WESTERN EUROPE (P. Agee & L. Wolf eds. 1978). In the book's introduction Agee states that he intended to create opposition to the CIA by publishing the identities of CIA employees. The

March 20, 1978, with an expiration date of March 29, 1983. However, the State Department determined that Agee's activities had caused damage to the national security and foreign policy of the United States and, perhaps believing those activities took on special significance because of the Iranian crisis,[114] moved to revoke his passport on December 23, 1979.[115] The Secretary relied on 22 C.F.R. §§ 51.70(b)(4) and 51.71(a) which were promulgated pursuant to the Passport Act of 1926. 22 C.F.R. § 51.70(b)(4) provides that:

> A passport may be refused in any case in which:
> The Secretary determines that the national's activities are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.

Pursuant to these regulations,[116] Agee was advised by the State Department of his right to a hearing on the revocation of his passport. However, he elected not to exhaust his administrative remedies even though he was advised that the United States Consulate in Hamburg was prepared on an expedited basis to receive any evidence he desired to present.[117] Rather, Agee filed suit in the U.S. District Court for the District of Columbia against then Secretary of State Vance. In addition to allegations of violations of his first and fifth amendment rights, Agee's complaint prayed that "the court (a) declare 22 C.F.R. §§ 51.70(b)(4) and 51.71(a) are invalid and unconstitutional on their face and as applied to Agee and (b) withdraw the revocation and restore Agee's passport."[118] The

---

book contains an appendix of 415 pages that purports to list and describe a large number of undercover CIA employees.

114. An article in the *New York Post* on December 17, 1979, reported that Agee had been invited to visit Iran to serve on an "international tribunal" to judge the American hostages held captive there. Agee denied that such an invitation had been extended. Agee v. Musk, 629 F.2d 80, 81 n.1 (D.C. Cir. 1980).

115. *Id.* at 81.

116. In addition, 22 C.F.R. § 51.71(a) states: "A passport may be revoked, restricted or limited where: The national would not be entitled to issuance of a new passport under § 51.70."

117. 629 F.2d at 91 (MacKinnon, J., dissenting).

118. *Id.* at 92. Agee's complaint asserted that the revocation of his passport was invalid and unlawful for the following reasons:

> a. Revocation for the reasons set out in 22 C.F.R. § 51.70(b)(4) has not been authorized by Congress, and is therefore impermissible;
> b. 22 C.F.R. § 51.70(b)(4) is vague and overbroad, in violation of the First Amendment;
> c. In the circumstances of this case, revocation without prior notice and hearing

district court granted Agee's motion for summary judgment based on the determination that the challenged regulations were invalid. The district court, without reaching other issues raised in the complaint, stated: "[A]ll that is held here is that because Congress has not acted to grant the Secretary authority, the regulation in issue cannot be upheld."[119]

On appeal, a divided panel of the court of appeals affirmed the district court's ruling. The majority found that 22 C.F.R. § 51.70(b)(4) was invalid because it was promulgated and enforced against Agee without the requisite express or implied authorization of Congress.[120] The Secretary contended that the Passport Act of 1926, interpreted consistently with the President's power to conduct foreign affairs and protect national security, authorizes the revocaton of Agee's passport under the challenged regulation. In response, the court stated that the Passport Act does not expressly authorize the Secretary to deny or revoke a passport on national security or foreign policy grounds.[121] Next, the Secretary asserted that past administrative and legislative practice confirms congressional approval of his ability to deny or revoke passports on the basis of "serious damage to the national security or the foreign policy of the United States."[122] In disposing of the Secretary's second argument, Judge Robb, writing for the majority, reasoned that:

> [T]he Secretary details only one instance in twelve years in which 22 C.F.R. § 51.70(b)(4) was employed to revoke a passport and only five refusals to passport applications . . . which were even arguably for national security and foreign policy reasons. Regardless of whether Congress was aware of these scattered examples when it adopted the Passport Act in 1926 and other travel control legislation in 1941, 1952 and 1978, such evidence hardly amounts to a 'substantial and consistent administrative practice' demonstrating implied Congressional authorization for the challenged regulation. Until Agee's case arose, 22 C.F.R. § 51.70(b)(4) was virtually unused.[123]

---

violates the due process clause of the Fifth Amendment;

d. Revocation deprives plaintiff of liberty without due process of law, in violation of the due process clause of the Fifth Amendment;

e. Defendant revoked plaintiff's passport in order to penalize and suppress his criticism of the United States government's policies and practices, in violation of the First Amendment.

119. Agee v. Vance, 483 F. Supp. 729, 732 (D.D.C. 1980).

120. 629 F.2d at 87.

121. *Id.* at 85.

122. *Id.* at 86.

123. *Id.* [footnotes omitted].

Furthermore, the majority found no merit in the proposition put forth by the dissent that *Zemel* upholds passport revocation on national security and foreign policy grounds "in the broad sense of those terms."[124] Rather, as the majority read *Zemel:* "[t]he heart of the opinion is the statement that '[t]his is therefore not like *Kent v. Dulles* . . . where we are unable to find an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it.' . . . [Hence, *Zemel*] merely sustained . . . the imposition of area restrictions . . . because it had been 'implicitly approved' by Congress."[125] The majority then considered other statutes, regulations, proclamations and orders relied on by the Secretary concerning the power of the Executive to restrict or condition the issuance of passports during times of war or national emergency. These were found to be inapposite on the issue of implicit authority to invoke national security or foreign policy considerations during peacetime.[126] Thus, the court concluded that § 51.70(b)(4) was promulgated and enforced without express or implied authorization of Congress and was, therefore, invalid.

Judge MacKinnon, in his lengthy dissent, argued that the provision of the Passport Act authorizing the President to issue passports "under such rules as [he] shall designate and prescribe for and on behalf of the United States"[127] was of sufficient breadth to authorize the questioned rule.[128]

According to Judge MacKinnon, the "rule for decision" in *Agee* emerges from an examination of prior administrative practice. Relying on *Zemel,* Judge MacKinnon asserted that:

> In analyzing prior administrative practice it is erroneous to restrict the inquiry solely to revocations since 1968 when the regulation [22 C.F.R. § 51.70(b)(4)] reached its present form. That regulation merely codified the Secretary's long-standing interpretation of his authority under the [Passport Act] since the date of its original enactment in 1856. It is this consistent interpretation of the Act over its entire life that constitutes the prior administrative practice that must be considered.[129]

---

124. *Id.* at 84.

125. *Id.* at n.4, *quoting* Zemel v. Rusk, 381 U.S. 1, 12 (1965).

126. *See, e.g.,* Pub. L. No. 65-154; 40 Stat. 559 (1918); Pub. L. No. 77-144, 55 Stat. 252 (1941); Pub. L. No. 82-414, 66 Stat. 190 (1952); Pub. L. No. 95-426, 92 Stat. 971 (1978).

127. 22 U.S.C. § 211a (1976).

128. 629 F.2d at 94 (MacKinnon, J., dissenting).

129. *Id.* at 101 (MacKinnon, J., dissenting).

The United States Supreme Court granted the government's petition for certiorari[130] to determine whether the Passport Act authorized the revocation of Agee's passport pursuant to the challenged regulation. The Supreme Court reversed the court of appeals and held that the policy announced in the State Department's regulation was sufficiently "substantial and consistent" to compel the conclusion that Congress had approved it.[131]

The Court relied primarily on *Kent* and *Zemel* to support its finding. In doing so, however, it failed to adhere to the aspects of those cases which counsel that only long-standing and consistent prior administrative practice is probative of the issue of congressional authorization.[132]

The Court cut back from *Kent* and *Zemel* at the outset by stressing that a consistent administrative construction of the Passport Act of 1926 must be followed by the courts "unless there are compelling indications that it is wrong."[133] After briefly tracing the history of the Executive's policy with regard to the regulation of passports, the Court, citing *Zemel,* suggested that congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy.[134] The Court, however, maintained that in *Agee,* as in *Zemel,* the inference of

---

130. Muskie v. Agee, 449 U.S. 818 (1980).

131. Haig v. Agee, 453 U.S. 280, 306 (1981).

132. *Id.* at 310-11 (Blackmun, J., concurring). In his concurring opinion, Justice Blackmun noted the force in Justice Brennan's dissent to the extent that it argued that the majority opinion in *Agee* could not be reconciled with *Kent* and *Zemel* and that the Court was cutting back from those cases *sub silentio.* Justice Blackmun went on to write:

> I would have preferred to have the Court disavow forthrightly the aspects of *Zemel* and *Kent* that may suggest that evidence of a longstanding Executive policy or construction in this area is not probative of the issue of congressional authorization. Nevertheless, believing that this is what the Court in effect has done, I join its opinion.

Id.

133. *Id.* at 291, citing, E. I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977), quoting, Red Lion Broadcasting Co. v. FCC, 395 U.S. 381 (1969), Compare Zemel v. Rusk, 381 U.S. 1, 11 (1965). It is noteworthy that the Court cited to that page of the *Zemel* decision to support its holding that the Secretary's construction of the Passport Act must be followed by the courts. One of the decisions cited in that portion of the *Zemel* opinion as authority for the proposition that weight must be given to administrative interpretations was Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1932). There, the Court did not rely on administrative construction but held that: "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons. . . ." 288 U.S. at 315.

134. *Id.* at 301.

congressional approval was supported by more than mere congressional inaction. As noted above,[135] Congress amended the Immigration and Nationality Act in 1978 to empower the President to require passports for international travel at all times. In the same year, Congress amended the Passport Act to place limitations on the power of the Secretary of State to impose area restrictions.[136] Chief Justice Burger found these amendments to be persuasive evidence of congressional approval of the Secretary's interpretation of his authority to refuse or revoke passports. The Court, relying on *Zemel,* reasoned that when Congress enacted legislation relating to passports in 1978, it left completely untouched the rule-making authority granted in the earlier Act.[137] Therefore, the Court presumed that Congress adopted the administrative construction.[138]

In response to Agee's argument that the only way the Executive can establish implicit congressional approval is by proof of longstanding and consistent enforcement of the claimed power, the Court held:

> [I]f there were no occasions—or few—to call the Secretary's authority into play, the absence of frequent instances of enforcement is wholly irrelevant. The exercise of power emerges only in relation to a factual situation, and the continued validity of the power is not diluted simply because there is no need to use it . . . Although a pattern of actual enforcement is one indicator of Executive policy, it suffices that the Executive has "openly asserted" the power at issue.[139]

Furthermore, the Court found its decision in *Kent* to be consistent with this reasoning. Noting the government's policy at issue in that case had not been enforced consistently, the majority asserted that the *Kent* Court had serious doubts as to whether there was in reality any definite policy in which Congress could have ac-

---

135. *See* text accompanying note 66 *supra.*

136. Pub. L. No. 95-426, Title I, Section 124, 92 Stat. 971 (1978). The 1978 amendment added the following language:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of the United States travelers.

137. 453 U.S. at 301, *citing,* Zemel v. Rusk, 381 U.S. at 12.

138. *Id.* at 301 n.50. That presumption is bottomed on the idea that when Congress enacted the 1978 amendments without altering existing legislation, it adopted and confirmed the Executive's interpretation of its authority. *See* Agee v. Muskie, 629 F.2d 80, 102 (D.C. Cir. 1980)(MacKinnon, J., dissenting).

139. 453 U.S. at 302-03.

quiesced.[140] That policy was contrasted with the policy announced in the regulation challenged in *Agee*. After enumerating only four instances where the authority embraced in that regulation was exercised, the Court concluded:

> Here, by contrast, there is no basis for a claim that the Executive has failed to enforce the policy against others engaged in conduct likely to cause serious damage to our national security or foreign policy. It would turn *Kent* on its head to say that simply because we have had only a few situations involving conduct such as that in this record, the Executive lacks the authority to deal with the problem when it is encountered.[141]

Additionally, the majority found Agee's constitutional arguments to be without merit. Finding that the liberty to travel abroad is subordinate to national security and foreign policy considerations,[142] the Court rejected Agee's claim that the revocation of his passport violated his freedom to travel. The Court similarly rejected Agee's arguments that the Secretary's action was intended to penalize his exercise of free speech and that the failure to accord him a prerevocation hearing violated his right to procedural due process. Those fifth amendment guarantees were held to require no more than Agee received: a statement of reasons and an opportunity for a prompt postrevocation hearing.[143]

---

140. *Id.* at 303.

141. *Id.*

142. *Id.* at 306. In the majority's view, the restriction on Agee's freedom to travel was not constitutionally impermissible inasmuch as the express language of the State Department regulation limited its application to only those cases that involved "serious damage" to national security or foreign policy.

143. *Id.* at 310. It is arguable that this holding cannot be reconciled with the Court's decision in Matthews v. Eldridge, 424 U.S. 319 (1976). One of the factors the Court there considered relevant in determining what process is due, in addition to the private interest affected and the likelihood of erroneous deprivation, was the government's interest in summary procedure. In *Agee*, the government argued that its interest in preserving national security justified its decison to offer a postrevocation hearing. However, it is difficult to accept the argument that the circumstances surrounding Agee's activities justified emergency action. When his passport was renewed in 1978, the Secretary was aware of his intention to disclose the identities of undercover CIA agents. Summary action would not be appropriate in 1979 where the government had knowledge that Agee's activities were "harmful to national security or foreign policy"—squarely within 22 C.F.R. § 51.70(b)(4)—for well over a year. Even if the government's interest in curtailing Agee's activities justified the postponement of a full-dress hearing, it did not justify dispensing with the bare rudiments of due process recognized in *Matthews* and Goss v. Lopez, 419 U.S. 565 (1975): prior notice and informal procedures ensuring an opportunity to be heard. Where those safeguards have not been afforded, summary revocation of a passport violates the right to procedural due process guaranteed under the fifth amendment. Brief for Respondent at 118-19, 122-24,

The principal defect in the majority's reasoning was underscored in Mr. Justice Brennan's dissent.[144] Specifically, Justice Brennan considered the majority's reliance on *Kent* and *Zemel* to be fundamentally misplaced. Neither of those cases, he contended, held that long-standing Executive policy or construction is sufficient proof that Congress has implicitly authorized the Secretary's action.[145] In fact, the test used by the majority in *Agee* was expressly disavowed by *Kent:*

> Under the 1926 Act and its [1856] predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said. This long-continued *executive construction* should be enough, it is said, to warrant the inference that Congress adopted it . . . . But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was *exercised,* not in the *bare fact that he had discretion.*[146]

Justice Brennan maintained that this language requiring evidence of the Executive's exercise of discretion reveals a preference for the strongest proof that Congress knew of and acquiesced in that authority.[147] The Executive's authority to revoke passports touches an area fraught with important constitutional rights and *Kent* cautions that the Court should therefore "construe narrowly all delegated powers that curtail or dilute them."[148] The Secretary's action in *Agee* undeniably curtailed Agee's freedom to travel internationally, and arguably chilled his ability to speak out against government policies. Because of these "sensitive constitutional questions," Justice Brennan stressed that the normal rule which allows deference to be given to administrative construction

---

Muskie v. Agee, On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (No. 80-83, 1980 Term)(hereinafter Brief for Respondent); *see* Bauer v. Acheson, 106 F. Supp. 445, 451-52 (D.D.C. 1952)(procedural due process held to require not a judicial hearing, but at least a procedure containing elements of notice and opportunity to be heard before reaching of judgment).

144. 453 U.S. at 310 (Brennan, J., dissenting).

145. *Id.* at 314 (Brennan, J., dissenting).

146. *Id.* at 314-15 (Brennan, J., dissenting), *quoting,* Kent v. Dulles, 357 U.S. 116, 124-25 (1958).

147. 453 U.S. at 315 (Brennan, J., dissenting). *Accord,* Woodward v. Rogers, 344 F. Supp. 974, 985 (D.D.C. 1972), *aff'd,* 486 F.2d 1317 (D.C. Cir. 1973); *see also* Lynd v. Rusk, 389 F.2d 940, 945-46 (D.C. Cir. 1967).

148. 357 U.S. at 129.

is not applicable.[149] That rule, which is typically used in the context of economic regulation,[150] does not require the strongest proof. In Justice Brennan's view, only when Congress has maintained its silence in the face of a consistent and substantial pattern of actual passport denials or revocations can the Court be sure that Congress is aware of the Secretary's actions and has implicitly approved that exercise of discretion.[151] Accordingly, Justice Brennan concluded:

> The Constitution allocates the law-making function to Congress, and I fear that today's decision has handed over too much of that function to the Executive . . . . [T]he Court professes to rely on, but in fact departs from, the two precedents in the passport regulation area, *Zemel* and *Kent*. . . . Because I find myself unable to reconcile those cases with the decision in this case, . . . and because I disagree with the Court's *sub silentio* overruling of those cases, I dissent.[152]

The Court has clearly rejected the aspects of those cases which govern delegations of congressional authority to the Executive Branch in the passport revocation context.[153] They have been replaced with reasoning which fails to take account of the impact the Secretary's action has on the right to travel abroad.

The correct analysis is not difficult. A cursory reading of *Kent* and *Zemel* will reveal what should have been the inquiry in *Agee:* "whether there exists 'with regard to the sort of passport [revocation] involved [there], an administrative *practice* sufficiently substantial and consistent to warrant the conclusion the Congress had implicitly approved it.' "[154]

In contrast, the Court held the absence of the enforcement of the Secretary's purported authority to be irrelevant and, citing *Zemel,* claimed that it was sufficient if the Secretary has "openly asserted" the power at issue.[155] Further, the Court held that this

---

149. 453 U.S. at 315 (Brennan, J., dissenting).

150. *See, e.g.,* Udall v. Tallman, 380 U.S. 1 (1965)(deference rule applied to Secretary of Interior's construction of an executive order as not denying his authority to issue oil and gas leases); Federal Trade Comm'n v. Borden Co., 383 U.S. 637 (1966) (deference rule applied to Commission's construction of Clayton Act which prohibited price discrimination between different purchasers of commodities of "like grade and quality").

151. 453 U.S. at 315 (Brennan, J., dissenting).

152. *Id.* at 319-20 (Brennan, J., dissenting).

153. *See* text accompanying note 108 *supra.*

154. 453 U.S. at 314 (Brennan, J., dissenting), citing Zemel v. Rusk, 381 U.S. 1, 12 (1965).

155. *See* text accompanying note 139 *supra.*

proposition is not inconsistent with *Kent*.

In *Kent*, however, the Court decided that the criterion for establishing congressional assent by inaction is the actual imposition of power, not the mere assertion of power.[156] Administrative practice was clearly recognized as "the key to [the] problem." The majority distinguished *Kent* claiming that it focused on administrative policy and reasoned that in light of the scattered enforcement of the policy at issue in *Kent*,[157] the Court doubted that there was a definite policy in which Congress could have acquiesced.[158] But the Court was cognizant of a definite policy at issue in that case. The dispositive factor in the mind of Justice Douglas was the fact that, because of the scattered enforcement of the Executive's policy, an administrative practice had not jelled around it.[159] Justice Douglas, writing for the majority, recognized that, despite the broad terms used to express the Secretary of State's power over the issuance of passports, the cases of passport refusals generally fell into two categories: questions relating to the citizenship of the applicant and his allegience to the United States, and cases involving criminal and unlawful conduct. Those two grounds for refusal were

> the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice . . . . [The rulings] as respects Communists . . . are scattered . . . and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the [Passport Act] was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned.[160]

Since a consistent practice of refusing passports to Communists had not been demonstrated, congressional authorization of the regulation in issue could not be "fairly" implied and it was therefore found to be invalid.

Notwithstanding the language of *Zemel* to the contrary,[161] the majority read that case to require the Executive must have only

---

156. *See* text accompanying note 146 *supra*.

157. *See* note 8 *supra*.

158. *See* text accompanying note 140 *supra*.

159. Kent v. Dulles, 357 U.S. 116, 128 (1958).

160. *Id.*

161. In *Zemel*, 381 U.S. at 18, the Court expressly reaffirmed the reasoning of *Kent*. *See* text accompanying note 108 *supra*. Once again, the Court limited the Secretary's authority under the Passport Act to those passport refusals and restrictions which were adopted by Congress in light of prior administrative practice.

"openly asserted" the power at issue.[162] The absence of consistent enforcement was deemed irrelevant. Reliance was placed on *Zemel* to support the notion that "congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy."[163] Moreover, the 1978 amendments to the Immigration and Nationality Act and the Passport Act, enacted in the face of the administrative policy involved in *Agee,* were found to be weighty evidence of congressional approval.[164] This reading, however, misconstrues the rationale of *Zemel.*

The *Zemel* Court focused on the Executive's interpretation of its power to impose area restrictions. The Court's recognition of the Executive's consistent prior practice of imposing those restrictions was the basis for its decision.[165] The fact that an administrative practice had jelled around the Executive's policy was the factor that distinguished *Zemel* from *Kent.* As Chief Justice Warren wrote for the majority:

> This case is therefore not like Kent v. Dulles, where we were unable to find, with regard to the sort of passport refusal involved there, an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it.[166]

As Justice Brennan's dissent points out, the majority's reliance on material expressly abjured in *Kent* becomes understandable when one appreciates the paucity of the recorded administrative practice with respect to the policy the Secretary sought to implement in *Agee.*[167] The court of appeals identified only six passport denials or revocations that were arguably based on national security or foreign policy considerations relating to an indi-

---

162. *See* text accompanying note 139 *supra.*

163. 453 U.S. at 300; *see* note 133 *supra* (discussion of deference given to prior administrative *practice* in *Norwegian Nitrogen Prod. Co.*).

164. 453 U.S. at 301.

165. In *Zemel* the Court did suggest that: "Congress' failure to repeal or revise in the face of [an] administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress." 381 U.S. at 11. However, when that sentence is read in the context of the reasoning of the entire opinion, it is evident that the Court's decision was based on prior administrative practice. Indeed, a consistent and longstanding practice had jelled around the Secretary's policy of imposing area restrictions. *See* text accompanying notes 97 & 98 *supra.* The passage of the Immigration and Nationality Act in 1952, in the face of this prior practice, was found to leave "completely untouched the broad rule-making authority granted in the [Passport] Act" 381 U.S. at 12.

166. 381 U.S. at 12; *see* text accompanying note 154 *supra.*

167. 453 U.S. at 317.

vidual.[168] In the majority's view, the fact that there had only been scattered enforcement of the Secretary's power did not dilute its continued validity.[169] That circular reasoning, however, cannot be reconciled with a faithful application of the *Kent-Zemel* analysis. Without a consistent administrative practice which can be shown to have jelled around the Secretary's policy, there can be no implicit congressional approval. Accordingly, without such approval the power the Secretary seeks to assert is invalid and, therefore, there is nothing to dilute.

The *Agee* Court has expressly subordinated the right to travel abroad to national security considerations. Of course, the Executive's special responsibility over matters relating to foreign affairs and the reluctance of the courts to interfere in that area is well established. However, as the Court emphasized in *Baker v. Carr*,[170] "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." When the Executive is acting in that realm its acts must not be in conflict with the provisions of the Constitution.[171] The invocation of the spectre of national security cannot create powers to abridge liberty that Congress has not conferred,[172] and does not override the strict rule that the power to restrict the right to travel abroad must be narrowly construed.[173]

---

168. Agee v. Muskie, 629 F.2d 80, 86 (D.C. Cir. 1980). In 1906, a passport was denied to a citizen who had gone to China where he became notorious as a promoter of gambling and prostitution. In 1907, a passport was denied to Nelken Waldberg, an American citizen engaged in blackmailing and "in disturbing and endeavoring to disturb the relations of this country with foreign countries" by libeling members of the diplomatic corps in Egypt. In 1954, Colonel Hubert Julian's request for a passport was denied because his activities, which included supplying arms to various countries, were considered prejudicial to the United States. In 1955 two passport applications were refused because the political activities of the applicants abroad were causing internal problems for foreign governments. In 1970 the Secretary revoked the passports of two persons who sought to travel to the site of an international airplane hijacking. In addition, as the government's brief points out, in 1948 the Secretary denied Rep. Isacson's request for a passport because the congressman sought to attend a foreign conference in support of an on-going Greek rebellion that this country was then opposing. Brief for Petitioner at 39, Muskie v. Agee, On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (No. 80-83, 1980 Term).

169. 453 U.S. at 302.

170. 369 U.S. 186, 211 (1962).

171. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

172. Brief for Respondent at 10, *citing*, Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

173. Brief for Respondent at 24; *see* Kent v. Dulles, 357 U.S. 116, 129 (1958); Lynd v. Rusk, 389 F.2d 940, 945 (D.C. Cir. 1967).

Prior to *Agee*, the Court refused to readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold passports. Executive actions restricting individual liberty were not permitted in the absence of clear congressional authority.[174] In this connection, Justice Brennan wrote in *Agee* that:

> The presumption is that Congress must expressly delegate authority to the Secretary to deny or revoke passports for foreign policy or national security reasons before he may exercise such authority. To overcome the presumption against implied delegation, the Government must show an 'administrative practice sufficiently substantial and consistent.'[175]

That presumption is clearly not overcome by an array of Executive Orders, regulations, instructions to consular officials and notices to passport holders. Moreover, broad statements by the Executive Branch relating to its discretion in the passport area lack the precision of definition that would follow from concrete applications of that discretion in specific cases.[176]

As the Court held in *Zemel*, the Executive's authority under the Passport Act takes its content from history. The parameters of the authority conferred are defined by the scope of prior practice under the Act. Even if Congress generally approved of the Executive's overall policy, it still might disapprove with the pattern of applying that broad rule in specific categories of cases.[177] Thus, a pattern of enforcement must be demonstrated as evidence that

---

174. Brief for Respondent at 59. *See, e.g.*, Gutknecht v. United States, 396 U.S. 295 (1970); NLRB v. Fruit and Vegetable Packers, 377 U.S. 58 (1964); Green v. McElroy, 360 U.S. 474 (1959); Duncan v. Kahanamoku, 327 U.S. 304 (1946); Ex Parte Endo, 323 U.S. 283, 300 (1944).

175. 453 U.S. at 318 (Brennan, J., dissenting), *citing*, Zemel v. Rusk, 381 U.S. 1, 12 (1965).

176. *Id.* at 315 (Brennan, J., dissenting).

177. *Id.* In fact, as the majority pointed out in the Court of Appeals, 629 F.2d at 85 n.4, the State Department was twice unsuccessful in seeking from Congress the power to deny or revoke a passport on national security or foreign policy grounds. In 1958, S. 4110, 85th Cong., 2d Sess. was introduced by Sen. Greene at the request of the Secretary of State. That bill, if enacted, would have permitted the denial of a passport to a person whose activities or presence abroad would "seriously impair the conduct of the foreign relations of the United States" or would "be inimical to the security of the United States." In 1966 Rep. Hays introduced H.R. 14895, 89th Cong., 2d Sess. which was designed to authorize the Secretary to refuse to issue or revoke a passport if he "determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." That language is almost identical to the language of the regulation which the *Agee* majority found to be implicitly approved by Congress. Both bills died in committee.

constitutes the strongest proof that Congress knew of and acquiesced in the Executive's authority.[178] Prior decisions of the Supreme Court emphasize that only the clearest evidence of prior administrative practice should permit the Court to consider congressional silence to be a substitute for explicit and affirmative action in limiting the free exercise of important rights.[179]

CONCLUSION

In the progression of cases from *Kent,* to *Zemel,* to *Aznavorian,* the Supreme Court has expressed its cognizance of the existence of the right to international travel in our constitutional framework. Moreover, the Court has distinctly rejected the notion that such a right springs from the first amendment or is the equivalent of the fundamental right to travel among the states. Rather, the Court has unquestionably embraced the idea that the right to travel abroad is an aspect of the "liberty" protected by the due process clause of the fifth amendment.

That position of the right to international travel in our scale of rights does not necessitate that a "compelling government interest" be shown to justify its infringement. The Executive is only required to have a "rational basis" for the limitation imposed. Where limitations on the travel right are based on legitimate national security and foreign policy considerations affecting the public generally, the applicable standard has been met.

However, due to the important constitutional freedoms involved in the passport regulation context, limitations placed on the citizen's right to travel abroad must be made pursuant to the law-making function of Congress.[180] If Congress has not given the Executive the authority to curtail that right in a specific category of cases, the rational basis for the Executive's actions becomes immaterial.

Congress delegated the authority to regulate the issuance of passports to the Executive in the Passport Act of 1926. The *Zemel* Court recognized that the Act confers sweeping powers on the Executive in that area. While the Executive is not expressly empow-

178. 453 U.S. at 315 (Brennan, J., dissenting).

179. *See, e.g.,* Kent v. Dulles, 357 U.S. 116, 125 (1958); Green v. McElroy, 360 U.S. 474, 506-07 (1959); Ex Parte Endo, 323 U.S. 283, 300 (1944); *see also* Woodward v. Rogers, 344 F. Supp. 974, 985 (D.D.C. 1972).

180. Kent v. Dulles, 357 U.S. 116, 129 (1958).

ered to deny or revoke passports on national security grounds, there is no explicit language in the Act providing that he may not do so.[181] However, in reaffirming *Kent, Zemel* held that the Passport Act "authorizes only those passport refusals and restrictions 'which it could [be] fairly . . . [implied] were adopted by Congress in light of prior administrative practice. . . .' "[182] That narrow construction of the Executive's authority was preferred because of the restrictive effect passport regulation has on the citizen's right to travel abroad.

In *Agee,* the Supreme Court has repudiated the teaching of *Kent* and *Zemel* and has essentially overruled those cases by reading them to hold that congressional approval of a State Department regulation may be implied in the face of a long-standing administrative policy. Notwithstanding the express language of both *Kent* and *Zemel* to the contrary, the lack of a consistent pattern of enforcement was deemed irrelevant.

The Court has liberally construed a delegation of the law-making function of Congress to the Executive under the Passport Act of 1926. In doing so, the Court has come perilously close to, if not arrived at, the point of giving the Secretary of State the unbridled discretion to withhold or revoke passports for any substantive reason he may choose.[183] By allowing the Executive to have such sweeping discretion in an area effecting important freedoms, the Court has handed over too much of the legislative function to the Executive.[184]

"Just as the Constitution protects both popular and unpopular speech, it likewise protects popular and unpopular travelers."[185] By

---

181. *See* text accompanying notes 95 & 96 *supra.*

182. *See* text accompanying note 108 *supra.*

183. Such a result runs directly contrary to *Kent,* where the Court, after concluding that an administrative practice had not jelled around the Secretary's policy at issue, 357 U.S. at 128, stressed that:

> We, therefore, hesitate to impute to Congress, when in 1952 [by enacting the Immigration and Nationality Act] it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

Id.

184. 453 U.S. at 319 (Brennan, J., dissenting).

185. *Id.* Justice Brennan set forth the following colloquy from the government's oral argument, which illustrates the "potentially staggering" reach of the Secretary of State's discretion under the majority opinion in *Agee:*

cutting back from its prior decisions in the passport regulation area, the Court has weakened that protection. Accordingly, perhaps the most disturbing aspect of *Agee* is that it indicates the Court's indifference to the constitutional dimension of the right to travel abroad.

EDWARD P. YANKELUNAS

QUESTION: General McCree, supposing a person right now were to apply for a passport to go to Salvador, and when asked the purpose of his journey, to say, to denounce the United States policy in Salvador in supporting the junta. And the Secretary of State says, I just will not issue a passport for that purpose. Do you think that he can consistently do that in the light of our previous cases?

SOLICITOR GENERAL McCREE: I would say, yes, he can. Because we have to vest these — The President of the United States and the Secretary of State working under him are charged with conducting the foreign policy of the Nation, and the freedom of speech that we enjoy domestically may be different from that we can exercise in this context.

Id. at n.9 (Brennan, J., dissenting).